

***United States Court of Appeals
for the Second Circuit***



**BRIEF FOR
APPELLANT**

ORIGINAL

76-7307

**United States Court of Appeals
For the Second Circuit**

IN THE MATTER OF THE PETITION

OF

THE TRUSTEES OF THE JOINT WELFARE FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNIONS 14, 14B, 15, 15A, 15C, 15D, AFL-CIO and THE TRUSTEES OF THE JOINT PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL UNIONS 14, 14B, 15, 15A, 15C, 15D, AFL-CIO for the Appointment of a Special Master Pursuant to Title 29, U.S.C., Section 186 (c) (5).

TRUSTEES OF THE JOINT PENSION FUND INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNIONS 14, 14B, 15, 15A, 15C AND 15D, AFL-CIO, other than Trustee THOMAS NOLAN, representing Local Union 14, 14B, I.U.O.E.,

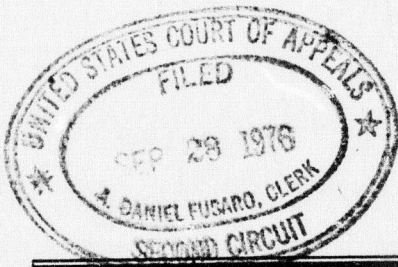
Appellants,

THOMAS J. NOLAN, as Trustee, Representing Local Unions 14, 14B, International Union of Operating Engineers, AFL-CIO,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

**BRIEF SUBMITTED ON BEHALF OF
APPELLANTS**



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Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF SUBMITTED ON BEHALF OF
APPELLANTS

Statement

The Trustees of the Joint Pension Fund, other than Trustee Thomas Nolan, appeal from the Order of Judge Robert J. Ward, dated May 25, 1976 denying the Motion

to modify the Order of May 21, 1975, and direct the Special Master to continue the process of determining an equitable allocation of the Joint Pension Fund following the procedures contained in Section 10 of the Joint Pension Plan.

Background of the Parties

New York City is the only local union jurisdiction in the United States and Dominion of Canada of the International Union of Operating Engineers (Washington, D.C.) where there exist two separate autonomous "hoisting and portable" local unions (17a).^{*} This is an important factor and its significance will shed some light on the problem as its facets unfold.

In all other local unions jurisdictions only one local "hoisting and portable" union is stationed and thus the local union in Philadelphia, Albany, Chicago, San Francisco, Toronto, Vancouver, each has union jurisdiction over *all* hoisting and portable equipment in their respective territorial jurisdictions. Each such "hoisting and portable" local union has but one Business Manager.

A "portable and hoisting" union is one whose members operate power cranes, shovels, bulldozers and all other construction equipment and are referred to as "engineers" or operators and in addition, the membership includes the

^{*} (Local 30, International Union of Operating Engineers is a "stationary" local union, whose members are licensed to operate, maintain and repair high pressure boilers and refrigeration equipment in dairies, ice-cream plants, breweries, meat-packing plants, hospitals, dye plants, etc. The jurisdiction of Local 30 extends from Montauk Point, L.I. to Poughkeepsie, including New York City where it is headquartered. Its members perform no construction work).

fireman, oiler and mechanic who work alongside the operator as part of the crew. No division as to Local Union membership exists with respect to the operator and fireman and oiler nor to those in other categories.

In New York City it is different. Local 14 members and its predecessor local union members operated power cranes, both truck cranes on rubber tired wheels and larger cranes on caterpillar tracks; power shovels in excavation and tower cranes such as were used in the construction of the World Trade Center. Local 14B members operate floating cranes in the Port of New York and Port Newark in the loading and unloading of ocean going vessels. Other Local 14B members operate cranes in the metallic scrap yards, sometimes by means of electromagnets suspended from the hook and which hoist the used automobiles transported from the automobile "graveyards" about the City into powerful hydraulic crushing machines which compact the frame and chassis into cubes weighing 300-400 pounds for delivery to steel mills in the United States, Japan and Italy.

Local 14 and 14B roughly have a membership of 1150 (12a). Thomas Nolan is the elected Business Manager and one of the two Union Trustees appointed to the Board of Trustees of the Joint Pension Fund under the provisions of the Joint Pension Trust Agreement (49a).

On the other hand, Local Union 15 and the predecessor's local unions furnished the firemen and oilers on the steam, coal fired cranes and steam shovels which were in use from before the turn of the century up to the middle twenties, when diesel and gasoline powered engines replaced the conventional coal fired steam crane and shovel. With the onset of newer types of building and construction such as bulldozers, front end loaders, back hoes, trenchers, the International Union granted this jurisdiction to the members of Local 15 and 15A.

Members of Local 15 and 15A are also engaged in the repair and maintenance of the cranes and compressors and other equipment operated by the members of Local 14 on the construction site. Members of Local 15 and 15A are also the electric and gas welders on the construction jobs and hook up and maintain the pipe lines carrying high pressure air, acetylene and other gases on to the job site. The Local 15a member continues to be the oiler and fireman on the gasoline and diesel powered cranes operated by the members of Local 14 and together are called the "crew" on the "rig". Members of Local 15 also operated the hydraulic crane known as the "cherry picker" and are the oilers and firemen on the floating rigs.

The members of Local 15B operate and maintain the equipment at the three racetracks of Aqueduct, Belmont and Saratoga and, having their own employer operated pension plan, are not covered under the Joint Pension Plan and thus are not involved in this law suit. They number but a couple of hundred members.

Local 15C members repair the heavy construction equipment of the franchise dealers of the manufacturers and large fleet owners of construction equipment on a year round basis in plants located in the Bronx all the way to Poughkeepsie (and formerly into New Jersey).

Local 15D members are the survey parties consisting of the Party Chief, Transit man and Rod man who lay out the roads, the concrete-reinforced building structures, the Second Avenue Subway, now in construction, the large water tunnel, 900 feet underground, completion of which had been temporarily deferred because of the financial problems affecting the City of New York and such notable structures as the Shea Stadium, the Yankee Stadium, the World Trade Center and the Long Island Expressway,

the Brooklyn Queens Expressway and Verazzano Bridge. Local 15D is the largest branch local of "field engineers" of the International Union in the United States and Canada and perhaps the largest in number of any International labor union in these two countries.

The membership of Local 15 and its branches covered by the Joint Pension Fund is approximately 5,200 (12a).

The hourly rate wage scale structure of the members of Locals 14 and 15 are roughly comparable with the exception that Local 14 operators on some large cranes having a long boom get an additional sum per hour for each foot the boom is in excess of 75 feet. The long boom cranes used principally in hoisting buckets of concrete and steel "I" beams are becoming fewer in number because of the danger obtaining in 300 foot long booms and the fact that caterpillar crane with its out-riggers sometimes occupies one-half of the street and blocks traffic, to the consternation of the Police and Traffic Departments of the City of New York.

Their replacement is the Tower crane from Australia, known in the trade as the "kangaroo" crane or the Tower crane from West Germany (113a). The crew on these Tower cranes consist of the Local 14 Engineer or operator and a maintenance members of Local 15 and sometimes a third member of the crew in the person of an oiler from Local 15A.

However, by reason of the ratio of membership between Local 15 and Local 14 is greater than 4 to 1, it is claimed that the contributions paid into the Funds are substantially larger in the case of Local 15. It was on this basis that Local 15 claimed it was "carrying" Local 14, its membership being better than 4 to 1 (12a, 13a, 101a, 112a).

The Collective Bargaining Agreements of both Local 14 and Local 15 are negotiated jointly with the employer groups, including the General Contractors Association of Greater New York and component building trade employer associations belonging to the Building Trades Employer Association. The wage scales and conditions of employment are also negotiated with the independent individual contractors and together the rates of wages and conditions of employment with respect to paid holidays, manning conditions on certain equipment, double time pay days, etc. negotiated with the large employer associations and independent contractors became the standards in the trade and are incorporated into the collective bargaining agreements. The latter are usually three year contracts commencing July 1st and ending June 30th.

When Governor Dewey, on July 1st, 1950 signed into law the New York State Disability Benefits Law, in his message to the Legislature, he recommended that the administration of the Law be handled by employers and separate insurance companies and smaller groups including labor unions. He did not want one huge insurance company such as the State Insurance Fund that exists in the field of Workmen's Compensation Law.

The signing into law of the New York State Disability Benefits Law by the Governor, gave rise to the establishment of welfare funds of labor unions to administer the law under the supervision of the New York State Insurance Department. Thus Joint Welfare Fund was organized under a trust agreement dated July 1, 1950.

The Trust Agreement as established, provided for the selection of an insurance company, licensed to do business in New York, as the vehicle to underwrite the hospital, medical, surgical benefits as well as those benefits provided for under the New York State Disability Benefits Law.

On January 1, 1956 the two local unions, 14 and 15, joined together to establish a "joint" pension fund, somewhat like was done on July 1, 1950 when the two local unions "joined" to establish the Joint Welfare Fund.

Inasmuch as the membership of both local unions occupied for years the same building from which the crews were dispatched to man the power cranes and shovels as requisitioned by the contractor and worked alongside of each other on building and construction jobs and were, in fact, "brothers" in the same International Union, the officers and membership of Local Unions 14 and 15 believed their joint assets in the Funds gave them greater leverage in dealing with the insurance companies contracted to underwrite the welfare and pension benefits. This is reflected in the original trust agreement (28a).

Later, when it was demonstrated by actuarial experience that these welfare and pension benefits could be purchased by the Trustees under a "self insured" fund the agreement with the insurance company was terminated and the Joint Welfare Fund became self insured.

To qualify as a "self insured" fund, entitling the Trustees to administer the New York State Disability Benefits Law, it was necessary to place a security in the form of United States government bonds with the Chairman of the Workmen's Compensation Board in Albany, in the event a participant was dissatisfied with a determination of the Trustees as to his claim. He had the right, under the Law, to process the dispute before the New York State Workmen's Compensation Board for final determination.

To the everlasting credit of the Administrator and Trustees, resort to the Workmen's Compensation Board was never required since the inception of the Joint Welfare Fund on July 1, 1950 for the policy established, that in

the case of a doubt as to the right of the participant to be entitled to a welfare, medical or surgical benefit, the vote invariably resolved the dispute in his favor. After all, it was the man's own money which was deducted from his weekly pay envelope and channeled into the Joint Welfare Fund by way of the contribution of 5% of his gross wages paid into the fund by his employer.

This Court can be informed by the entire Board of Trustees, with pride, that the administration of the Joint Welfare Fund by the Administrator, who with an able staff guided the destiny of the Joint Welfare Fund for over 20 years since its inception with that of a firm but sympathetic and liberal interpretation of the rules with a leaning toward the problems of the participant.

Upon the forced retirement of the Administrator because of serious ill health, his assistant for over 20 years became the Administrator. He, in turn, has administered the Joint Welfare Fund with the same high level of fairness to the satisfaction of the Trustees and the membership of both Local Unions 14 and 15. Of course, this is of particular pride to the two union Trustees insofar as the Joint Welfare Fund is concerned, whose divergent views concerning the Joint Pension Fund, brought about the present law suit.

Following the filing of the Petition for the appointment of a Special Master for the separation of the Joint Pension Fund, the Trustees voted to allow the assets of the Joint Welfare Fund to be paid out to participants of both Local Unions 14 and 15 as their respective claims were filed and processed.

The sole denominator in paying out the balance of assets of the Joint Welfare Fund was the independent impartial happening or occurrence of the illness, injury, hospitalization of the member or of his spouse or dependent

children, including the pregnancy of the member's wife, for which the Joint Welfare Fund provided benefits.

When the sum of approximately six million dollars on hand in the Joint Welfare Fund, when the Petition was filed, would be used up in the manner described above, the Joint Welfare Fund would come to an end merely by the means of attrition. This occurred on March 15, 1976 and no more claims can be submitted for payment as the assets are completely used up.

Hence, for all practical purposes there is nothing in the Joint Welfare Fund to be separated between the two local union successor Welfare Funds, except two small items, i.e.: The security in the form of United States Government bonds held by the Chairman of the Workmen's Compensation Board in New York State in the principal sum of \$454,000 and by the Chairman of the Workmen's Compensation Board in the State of New Jersey in the principal sum of \$17,000, and which sums are required to be held by the Chairman for a period of two years from the date the Joint Welfare Fund expired, to insure the payment of claims, incurred, if any, and not yet processed. To date, no such claims have been filed, and, of course, no claim has been denied or disputed.

In the present posture, it is assumed that the Chairman will refund to the Trustees the principal sum with interest sometime in 1977. The only other remaining asset of the Joint Welfare Fund is a first mortgage held on Quaker Ridge Apartments located on Third Avenue and 22nd Street, Manhattan, which the Trustees purchased, as a participant, along with the New York Bank for Savings and the General Electric Pension Fund. The principal sum of the Trustees participation is the sum of \$243,277.87.

The Trustees, rather than await the maturity of the bonds and mortgage have the option of selling it in the open market or to the Trustees of the Joint Pension Fund, at the price then obtaining in the market, upon the consent of all the interested parties.

When the collective bargaining agreements of Local Unions 14 and 15 came up for expiration on June 30, 1975, the new collective bargaining agreements provided that the employing contractors pay contributions to the four new funds established under new trust agreements of the respective local unions, as envisioned by Judge Ward (P. 178a) and described by Union Trustee (P. 112a) Maguire and Employer Trustee Robke (P. 153a), to wit:

- (1) Local Union 14-14B Welfare Fund
- (2) Local Union 14-14B Pension Fund
- (3) Local Union 15, 15A, 15C, 15D Welfare Fund
- (4) Local Union 15, 15A, 15C, 15D Pension Fund

Claims incurred after July 1, 1975, of necessity, are being processed from the new funds established above. However, pension applications continue to be processed out of the Joint Pension Fund until such time as the Joint Pension Fund is separated and divided, at which time the assets will be allocated, in the amounts determined and transferred to the Local 14 Pension Fund and the Local 15 Pension Fund, respectively.

**Events That Led to the Petition for the Appointment
of a Special Master to Separate and Divide
the Joint Pension Fund**

Under date of May 31, 1974, Mr. Thomas Nolan, Business Manager of Local 14 and Union Trustee, by letter, informed Mr. Thomas A. Maguire, Business Manager of Local 15 and Union Trustee, that the Trustees have failed or refused to adopt certain recommendations to remedy problems affecting the membership of his local union and that he would take all legal means at his disposal to effect a satisfactory solution including the possibility of a division of the Funds into separate funds for each Local Union (13a, 14a, 116a, 117a).

Mr. Maguire replied that upon the basis of a survey conducted of the Joint Pension Fund by an independent actuary engaged by Local 15, that said Local Union 15 would raise no objection if said Thomas Nolan, Business Manager and Union Trustee representing Local 14 chose to effect a division of the two Funds (P. 14a, 118a).

The two members of Local 14, Mr. Joseph Rizzuto and Mr. Daniel Finn mentioned in Mr. Nolan's letter of May 31, 1974 (P. 117a) were requested by Mr. Nolan to attend the Trustees' meeting and consent thereto was given by Mr. Maguire (P. 118a). Messrs. Rizzuto and Finn, are lay members of Local 14 and sought authorization, on the suggestion of Trustee Nolan, to investigate the books and records of five large contractors whom it was claimed were not paying contributions into the Funds.

Trustee Maguire asserted that these lay members had no credentials and background to do this type of work, particularly inasmuch as the Joint Pension Fund had a firm of Certified Public Accountants, an Actuarial firm and a firm of Attorneys capable of doing this investi-

gative work. Trustee Maguire stated further that Messrs. Rizzuto and Finn possessed no responsibilities as professionals have, in undertaking such a sensitive job and urged the two employer trustees and himself not to grant such an authorization solely on the suggestion of Trustee Nolan. Authorization was not given (95a, 96a).

Charges were made among the membership of Local 14 that \$10,000,000 was missing from the funds and these rumors percolated to the New York State Insurance Department who sent two examiners to the meeting of the Trustees to question Trustee Nolan concerning them. The latter was not present. In the meanwhile, in a very spirited election held in the Fall of 1974, Mr. Rizzuto was elected President and Mr. Nolan was re-elected Business Manager. In turn, Mr. Rizzuto, as President appointed himself as Alternate Trustee, under the provisions of the Trust Agreement (119a).

In reply to the questioning of the New York State Insurance Department examiners, Mr. Rizzuto replied no moneys were missing (122a) but concerning the charge stated "this was for political strategy" (97a, see minutes of October 30, 1974 under Exhibit "C", P. 122a).

An additional problem confronting Local 14, prior to the election in the Fall of 1974, was the claim that certain members of Local 14 who operated long boom cranes earned a greater sum than other engineers in Local 14 as well as those in Local 15 and thus were entitled to a higher pension benefit on the theory that 5% of their wages represented a bigger contribution to the Pension Fund (91a). To satisfy the demands of the very small number of operators of Local 14 who operated long boom cranes, Trustee Nolan urged the establishment of multi-levels of pension benefits, based on a minimum annual wage of \$18,000 per year (165a, 166a, 18a). This of

course, would deprive members of Local 14 and Local 15 of pension benefits if they failed to meet the minimum annual rate of employer contributions on their behalf (173a).

It was these problems that confronted Mr. Nolan as Business Manager of Local 14 that prompted his letter as Union Trustee to Union Trustee Maguire in which he stated he will take all legal means at his disposal even to the possibility of a *division* of the Funds into *separate* Funds for each local union. (emphasis supplied) (P. 116a, 117a).

The Appointment of the Special Master

Upon the submission of briefs by Counsel for the Board of Trustees in support of the Petition for the appointment of a Special Master and the brief of counsel for Local 14 to dismiss the petition, and after hearing oral argument, Judge Ward wrote a decision granting the Petition (176a).

Judge Ward, in touching all bases of the Taft-Hartley Act, Section 302(c)(5) 29 U.S.C. Section 186 (c)(5) and the Employee Retirement Income Security Act of 1974 (ERISA) 29 U.S.C. Sections 1001, *et seq.*, upon careful examination of ERISA and the facts in the case held that the proposed division of the funds is more nearly a transfer of assets within the meaning of Section 208, 29 U.S.C. 1058, than a termination of the plan within the meaning of Sections 4041 (178a, 179a).

Judge Ward stated that Section 208

“is based on the premises that employees and employers will continue to make contributions to plans for the employees’ benefits, although the plan may

be in different forms. It attempts to guarantee that such a change will not in any way reduce the benefits available to the employees." (179a, 180a)

POINT I

***Jurisdiction*—The Order of Judge Ward dated May 25, 1976 is a final order or decision and appeal to the Court of Appeals is authorized under Title 28 USC Section 1291.**

In his order dated May 25, 1976 Judge Ward adopts the Special Master's Recommendation dated May 21, 1976 and for the reasons set forth therein denies the motion to modify its Order dated May 21, 1975.

Judge Ward further directed the Special Master to continue the process of determining an equitable allocation of the Joint Pension Fund following the procedures in Section 10 of the Joint Pension Plan (302a).

The Special Master in following the Procedures in Section 10 the Joint Pension Plan will merely stand by while the actuaries for the contesting parties carry out the separation of the Joint Pension Fund, solely by following the procedures of Section 10. It constitutes a mere mathematical exercise for the actuaries for the appellants and the appellee to come up with the answer.

Nothing further is required to be done, either by the Special Master or Judge Ward except to attach their imprimatur in the form of a signature to the recommendation of the Special Master and the decree of the District Court by Judge Ward, respectively.

The procedure contained in Section 10 of the Joint Pension Plan is mathematically and actuarially precise and final (72a). Section 10. Termination reads as follows:

SECTION 10. TERMINATIONS

(1) The Plan may be terminated by the Board of Trustees only with the consent of the Unions and a majority of the Contributing Employers, and, in such event, all the funds of the Plan shall be used for the exclusive benefit of Participants and Pensioners as of the date of termination of the Plan, and shall be allocated in shares determined by the Board of Trustees on the basis of reserve values for the actuarial valuation made in accordance with subsection (2) of Section 7, in the following order:

First, each Pensioner shall be entitled to a share equal to the reserve computed to be required for his pension; and

Second, each Participant who has reached his 62nd birthday and has otherwise fulfilled the requirements of Section 4, hereof, shall be entitled to a share equal to the reserve computed to be required for his pension credits; and

Third, each other Participant shall be entitled to a share equal to the reserve computed to be required for his pension credits; provided that if the funds of the Plan are insufficient to provide in full for the shares under any of the above paragraphs, after provision for all shares under previous paragraphs, each share under such paragraph as to which the funds are insufficient shall be reduced pro rata.

(2) The Board of Trustees may require that all shares be withdrawn in cash or in immediate or

deferred annuities or other periodical payments as they may determine.

(3) Anything herein to the contrary notwithstanding, the rights of all Participants and Pensioners to benefits accrued to the date of any complete discontinuance of contributions, to the extent then funded shall be non-forfeitable.

In following the formula of Section 10, the actuaries have satisfied themselves, the Special Master and Counsel for all parties, including the individual trustees, that the application of sub-paragraphs, First and Second, will exhaust the \$30,000,000 that constituted the corpus of the Fund at the time the petition was filed in 1974.

Nothing will be left to take care of those participants in subdivision Third of Section 10. In other words the \$30,000,000 in the Joint Pension Fund will be used up paying pension benefits for two classes of participants, in Local 14 and Local 15, to wit:

- (a) persons already on pension
- (b) persons, not on pension at present, but who are eligible for pension, having reached their 62nd birthday and having met one of the requirements set forth in Section 4 of the Plan (68a)

The Special Master, in his recommendation to Judge Ward refers to this situation at Page 238(a) of his report:

"While the plan provisions do prescribe an allocation of shares to all other participants after the two prior groups are provided for, provision for these groups exhausts the available funds."

Unless the order of Judge Ward is reversed to the extent of striking Section 10 of the Joint Pension Plan, the actuaries will undertake to separate the Joint Pension Fund and the \$30,000,000 between the two priority classes set forth in Section 10 of Local 14 and Local 15, leaving the vast majority of participants in both local union disenfranchised.

All that is required to complete this task is to (1) obtain the names of all persons already on pension and (2) the names of all persons, age 62 years and over, who have otherwise fulfilled the requirements of Section 4 (3) compute the reserves necessary to fund the pensions of those persons in classes First and Second of Section 10 and remit the figures with the accompanying monies to the Trustees of the new Pension Funds of Local 14 and Local 15 respectively.

No further order or act is required to effect the separation other than to follow the procedures of Section 10. The result will be a mathematical and actuarial certainty of a generalized routine fashion. All questions of law and fact will have been completed upon the adherence to Judge Ward's order of May 25, 1976 mandating the procedures to be followed contained in Section 10 of the Joint Pension Plan.

Section 1291 reads as follows:

"The Courts of Appeal shall have jurisdiction from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, except where a direct review may be had in the Supreme Court."

The purpose of this section providing for appeals only from final decisions of federal districts is to combine in one review all stages of the proceeding that effectively may be reviewed and corrected if and when final judgment results.

See:

Cohen v. Beneficial Indus. Loan Corp., N. J. 1949,
69 S. Ct. 1221, 337 U. S. 541, 93 L. Ed. 1528.

It has been held also, that the purpose of the limitation giving Courts of Appeal jurisdiction to review, with exception of certain interlocutory orders, only those judgments, decrees and orders which amount to a final decision is to prevent piecemeal litigation and to eliminate delay consequent upon needless interlocutory appeals.

Peterson v. Locomotive Firemen and Enginemen,
C. A. Ind. 1959, 268 F. 2d 567.

The jurisdiction of the Court of Appeals is said to be statutory and any enlargement of the allowable list of appealable interlocutory orders, or abandonment of fragmentary appeals in the discretion of the trial judge, are choices within the Legislative domain, held the Supreme Court in the case of *Baltimore Contractors v. Bodinger*, 1954, 75 S. Ct. 249, 348 U. S. 176.

It is further recognized that the jurisdiction of the Court of Appeals as a constitutional Court, is not discretionary but is settled by Statute.

See:

Cohen v. Globe Indemnity Co., C. C. A. Pa. 1941,
120 F. 2d 791.

With these basic rules in mind, interpretation of what constitute a "final decision" has come down through the

cases and precedents established by the Supreme Court and the Courts of Appeal themselves.

Hence, because a determination of whether a ruling is "final" within this section, authorizing appeals is frequently so close a question, it is impossible to devise a formula to resolve marginal cases and a requirement of finality is to be given a practical rather than a technical construction.

See:

Gillespie v. U.S. Steel Corp., Ohio 1964, 85 S. Ct. 308, 379 U. S. 148, 152.

Further, a "final decision", within this section relating to final decisions of federal district courts does not necessarily mean the last order possible to be made in a case and requirements of finality should be given practical rather than technical construction and so the Court of Appeals held in *Kelly v. Greer*, C. A. Fla., 1965, 354 F. 2d 209.

Put another way, in criminal cases, as well as civil, the judgment is "final" for the purposes of appeal when it terminates the litigation on the merits and leaves nothing to be done but to enforce by execution what has been determined.

See:

Berman v. U.S., 58 S. Ct. 164, 302 U. S. 211;
U.S. v. Foster, C.A. N.Y. 1960, 278 F. 2d 567.

In the case at bar, Judge Ward's order directing the Special Master to follow the procedures of Section 10 of the Joint Pension Plan in separating the corpus of thirty million dollars between the two priority classes contained in Section 10 embraced in Local 14 and Local 15

ends the litigation for all intents and purposes. Nothing further need be done except the job of executing the results computed. No further questions of law and fact confronts the District Court. Its job is completed. The division has been made, the separation accomplished.

The Second Circuit in further implementation of what a "final" order is, within the intendment of Section 1291, said it must be not only in its nature final, but a complete disposition of the cause.

See:

Balboa Shipping Co. v. Standard Fruit & S.S. Co., C.A. N.Y. 1950, 181 F. 2d 109.

Judge Ward's order of May 25, 1976 does that, exactly. It disposes of the controversy and litigation, completely and with finality,

If the order or judgment disposes of the whole subject, gives all relief that was contemplated for giving effect to the judgment and leaves nothing to be done in the cause, save to superintend, ministerially, the execution of the decree then it is a "final judgment".

See:

City of Louisa v. Levi, 1944, 140 F. 2d 512;
R.F.C. v. Service Pipe Line Co., C.A. Okla., 1953,
 206 F. 2d 814.

The Second Circuit has reminded us, of course, that a "final judgment" is not necessarily the ultimate judgment completely closing up a proceeding, inasmuch as the word "final" does not have a meaning constant in all contexts.

U.S. v. 243.22 acres of Land v. Town of Babylon, Suffolk Co., N.Y., C.A. N.Y. 1942, 129 F. 2d

678, Cert. Denied 63 S. Ct. 441, 317 U. S. 698.

Further light on this subject was given in 1934 by the Court of Appeals in the case of *Victor Talking Machine Co. v. George*, C.C.A. N.J. 1934, 69 F. 2d 871, which held that a decree which settled the substantial rights of the parties and all that remained was to determine the amount of those rights was a "final decree" and appealable.

The rule of construction in assessing the requirements of finality for the purpose of appeal must be given a "practicable rather than a technical construction" and in this regard, inquiry requires evaluation of competing considerations underlying all questions of finality, such as inconvenience and costs of piecemeal review on one hand and the danger of denying justice by delay on the other.

See:

Williams v. Mumford, C.A. D.C. 1975, 511 F. 2d 363.

To allow the order of Judge Ward dated May 25, 1976 to remain undisturbed, requires the division of funds to follow the procedures of Section 10. On completion of the evaluation by all of the actuaries involved, representing the appellants and the appellee, and the actuaries representing the individual Trustees, which evaluation could conceivably take several months, and then have the decree executing, ministerially, the actuarial results, entered in the office of the Clerk of the District Court, before an appeal to this Court could be had, would be a waste, pure and simple. If Judge Ward's order of May 25, 1976 requiring the application of Section 10 is in error, let's find it out promptly. To allow the error if such be the case, to go to "term" before the right of appeal lay, would under the rule of construction in *Williams v. Mumford, supra*, represent a denial of justice by delay.

It could possibly cause a greater denial of justice to pensioners, who would be given certain levels of benefits under the formula of Section 10, only to be shocked upon being informed that the level of pension benefits allowed them under the formula of Section 10, was erroneous, because a goodly portion of the \$30,000,000 was not used for the 4,000 or more participants excluded by Section 10.

Nor can it be said that the order of May 25, 1976 is not a final order because it does not modify the prior order of May 21, 1975 for the reason that the Notice of Appeal can rightly be treated as taking an appeal from the prior order, which position the Second Circuit took in the case of *Maryland Tang Corp. v. M.S. Benares*, C.A. N.Y. 1970, 429 F. 2d 307.

The "collateral order doctrine" permitted an interlocutory order denying disqualification of an attorney to fall within the narrow confines of permissible appeals and hence was appealable as a "final order".

See:

General Motors Corp. v. City of N.Y., C.A. N.Y. 1974, 501 F. 2d 639.

The case at bar is far stronger, for the order appealed from, lays to rest, all the essential and fundamental phases of the controversy pertaining to the separation of the Joint Pension Fund.

Judge Moore, perhaps, put the ultimate brush of paint to the mural of what constitutes a "final judgment or final order" in the celebrated case of *Silver Chrysler Plymouth Inc. v. Chrysler Motors Corp.*, C.A. N.Y. 1974, 496 F. 2d 800. The Eastern District Court of New York (Weinstein, J.), 370 F. Supp. 581, denied a motion to disqualify a law firm from representing the franchise

dealer but the Second Circuit held the order denying disqualification of Counsel a final disposition of a claimed right which is not an ingredient of the cause of action and does not require consideration with it, and is thus appealable. As this Court stated in *Silver, Chrysler Plymouth, Inc. v. Chrysler Motors Corp.*, 496 F.2d at 805, "It is fatuous to suppose that review of the final judgment will provide adequate relief." In the case at bar, Judge Ward's order "upon this application was concluded and closed and its decision final in that sense before the appeal was taken". *Cohen v. Beneficial Indus. Loan Corp.*, 337 U. S. 541, 546, 69 S. Ct. 1221. See also, *U.S. v. Garber*, C.A. N.Y. 1969, 413 F. 2d 284; *Staggers v. Otto Gerdau Co.*, C.A. N.Y. 1966, 359 F. 2d 292, where "practical rather than a technical construction" is to be given to the order and where the only thing left is to enforce by execution what has been determined. These rulings and principles match precisely the facts in the case at bar.

There is little left to urge upon this learned Court the requirements constituting a "final order" for they were spelled out clearly in *Eisen I*, 379 F. 2d 119 and 18 months later in *Eisen II*, 391 F. 2d 555 where a dismissal of a "class action" was the "death knell of the entire action", so ably put by Judge Kaufman. The Supreme Court in *Eisen v. Carlisle*, 417 U. S. 156 at 170, again referring to *Cohen v. Beneficial Loan Corp.*, 337 U.S. 541, 5, reiterated the rule that the requirement of finality to be given a "practical rather than a technical construction. This rule is particularly warranted in the case at bar.

Unfortunately, the Special Master, in his recommendation to the Court, repeatedly refers to "Counsel for Local 15" instead of Counsel to the Board of Trustees or Counsel for the Petitioner as the movant to modify the Order of Judge Ward dated May 21, 1975 (237a). He also refers to the actuary of Local 15 instead of the Petitioner (239a). This may have caused some confusion as to who was seeking the relief sought.

POINT II

The Order of Judge Ward dated May 25, 1976 denying the motion to modify the order of May 21, 1975 is clearly erroneous, being totally inconsistent with the very language of said order directing "an equitable allocation" and opposed to Judge Ward's order of March 6, 1975, Appointing a Special Master to prepare a plan for submission which will equitably divide the Funds.

The petition of the Board of Trustees for the appointment of a Special Master to oversee the division of the Joint Pension Fund into separate pension funds of Local Union 14 and Local Union 15, together with supporting affidavits of the Trustees and the actuary makes clear reference to a *separation* of the Joint Pension Fund, in accordance with the resolution of the Trustees to effect such division or separation into a separate Pension Fund for Local 14 and a separate Pension Fund for Local 15; likewise the Joint Welfare Fund was to be separated into separate Welfare Funds for Local 14 and Local 15 respectively (18a, 19a).

Trustee Nolan in his demand for alleged remedial actions states in his letter of May 31, 1974 that he "will take all legal means . . . even to the possibility of a division of the Funds into separate Funds for each local union" (117a).

Employer Trustee Robke in his affidavit in opposition to motion to dismiss the Petition for the appointment of a Special Master expressed his view and that of Trustees Gerosa and Maguire that the 2 Joint Funds be divided into 4 separate funds for Local 14 and Local 15. Mr. Robke stated Trustee Nolan wanted the Funds "split" as soon as possible (153a).

Employer Trustee Gerosa in his affidavit in opposition to the motion of Local 14 to dismiss the petition says that Local 14 "desired to separate and divide the funds" (158a).

Union Trustee Maguire in his reply affidavit to that of Mr. Nolan says the use of the word "terminate" in his Mr. Nolan's affidavit of January 29, 1975 (162a) is a misnomer for Mr. Nolan in his letter of May 31, 1974 (117a) makes no reference to "termination", only to separation (170a).

Judge Ward in his decision (176a) denying the motion to dismiss the Petition, states

"that the proposed decision of funds is more nearly a transfer of assets within the meaning of Section 208, than a termination of plan within the meaning of Sections 4041 *et seq.* . . . It attempts to guarantee that such a change will not in any way reduce the benefits available to the employees. Sections 4041 *et seq.* on the other hand contemplate dissolution of existing plans, cessation of employer and employee contributions and payments for claims under the plan, and liquidation and distribution of assets to employees in accordance with their respective interests. It attempts to ensure that, in this event employees will receive such amounts as have vested in them by virtue of their contributions to the fund up to that time" (179a, 180a).

If as Judge Ward says the petition is for a decision of funds rather a "termination", how can the use of Section 10 be justified? Section 10 of the Pension Plan is listed under the heading of "Terminations" (72a). It was inserted into the plan at the time it was filed with the Tax Exempt Section of the Internal Revenue Service in the application for tax exempt status because the Internal

Revenue Code required a provision for dissolution in the event the Plan was terminated.

The Termination on dissolution, contemplated that certain participants would receive "cash surrender value" in lieu of continued funding of their pensions for the simple reason, that on "termination" the pension plan would go out of existence—would be no more. It would be somewhat like the "cash surrender value," provided for in some life insurance policies when the insurance was being terminated.

Judge Ward, in his decision, says the Board of Trustees argue that the proposed division of assets is not a termination of the funds, since they will continue to exist, to collect contributions and pay out benefits on the same as before, although administered as four pools of assets rather than two (178a). This is exactly what has occurred. Since July 1, 1975, when the existing collective bargaining agreements expired, Local 14 established two funds: Local 14 Welfare Fund and Local 14 Pension Fund. Similarly, Local 15 established two funds, Local 15 Welfare Fund and Local 15 Pension Fund.

Upon decision of the Joint Pension Fund, the assets will be transferred to the Pension Funds of Local 14 and Local 15 respectively. There will be no "pay out" to individual pensioners, as contemplated by Section 10.

The use of Section 10 disenfranchises over 6000 participants of both Local 14 and Local 15, who are not yet eligible for retirement while allocating all the funds to pensioners and those eligible for immediate pensions, which are about 1,100 (238a). The Special Master at (238a) says:

"Since Local 15 membership is about four times that of Local 14 it is easily seen that this distribution does not please Local 15".

Question: How does the above language reconcile with the mandate of Judge Ward in his memorandum order of March 6, 1975, appointing the Special Master where he says "accordingly, the Court will appoint a Special Master for the purpose of preparing a plan of submission to the Court which will *equitably* divide the funds" (Italics supplied Page 181a).

Question: How does the above language reconcile with the order of Judge Ward in his order appointing the Special Master, dated May 21, 1975 wherein Judge Ward orders the Special Master to submit *equitable* plans of division "which plan of division of the Joint Pension Fund shall follow the procedures set forth in Section 10 . . . (188a)

Question: How does the order of Judge Ward denying the motion to strike Section 10 dated May 25, 1976, reconcile with the language contained in said order "the Special Master is directed to continue the process of determining an *equitable* allocation of the Joint Fund following the procedures contained in Section 10 of the Joint Pension Plan" (302a) (italics supplied).

These orders of May 21, 1975 and May 25, 1976 on their face, are inconsistent with their own language, which speak of an equitable allocation. What is so equitable about the disenfranchisement of 5000 or more participants? Where is the consistency in the orders of the District Court which held that the division of assets was not a termination but more nearly a transfer of assets, and then turn around and mandate the use of Section 10 under the heading of "Terminations"?

The reasons or arguments advanced by Local 14 that there was a considerable period of time between the adop-

tion of the Trustees' Resolution and the protest of Local 15 and the Petitioner against the use of Section 10 (241a) are *non-sequiturs*. Assuming the resolution provided for the division of assets only to officers of Local 14 and Local 15 or to participants whose names began with the letter "Z", would that make for an equitable allocation? Would such resolution entitle the Special Master to recommend such a provision? Did the Special Master have the right to drop all rules of equity and recommend a plan containing Section 10 which would exclude thousands of participants from their fair, equitable share, particularly inasmuch as Judge Ward ruled it was a "separation" rather than a "termination?"

The Special Master says that it cannot be "alleged that was an overreaching since a copy of the March 24, 1975 letter of Doran, Colleran, O'Hara, Pollio & Dunne accompanying the Proposed Counter Order (Exhibit B to the O'Hara affidavit marked exhibit I) was given to Counsel for the Petitioner and for the Employer Trustees" (241a).

The argument of overreaching was not raised by Counsel for the Petitioners or Counsel for the Employer Trustees. Does the absence of a charge of "overreaching", justify the recommendation of an unequitable allocation by the Special Master? These are questions that have a bearing on the soundness of the Recommendation of the Special Master, insofar as equitable allocation or division of the Joint Pension Fund is concerned.

The Special Master at (240a) refers to the argument of Local 14 "there was no doubt that the Resolution of the Board of Trustees of June 11, 1974 which was unanimously adopted (see Exhibit A to affidavit of Richard O'Hara, dated October 6, 1975 and marked exhibit I) provided specifically for the use of Section 10 of the Re-

tirement Plan". This is incorrect. Nowhere does Section 10 appear in the language of the Resolution prepared by Local 14 attorney O'Hara and read from a piece of paper by Trustee Nolan.

And what about the protests of all Trustees that Section 10 was never intended. Were these protests overlooked by the Special Master under the canopy of the so-called unanimous resolution? Let's look at the record as a great American was wont to say.

1) Trustee Maguire in his affidavit in opposition to the motion of Local 14 to dismiss the petition says that the word "terminate" was contrived or made ostensible for the accommodation of Local 14 and not "separate", "divide" or "split" the funds (91a).

2) All trustees on June 11, 1974, prior to the filing of the Petition agreed that the Joint Welfare Fund and Joint Pension Fund were to be split, as suggested by Mr. Nolan in his letter of May 31, 1974 (998a, 99a).

3) Employer Trustee Robke informed the Trustees that his organization, the General Contractors Association approved the "splitting" of the Funds at a meeting said General Contractors Association held on May 29, 1974. Similarly the membership of Local 15 voted to have the Joint Funds separate and operate as separate distinct entities (102a).

4) Trustee Maguire makes reference to the affidavit of Mr. Nolan in which he refers to "termination" but which he says insofar as Local 15 is concerned means separation. Further Trustee Maguire says Local 14 also intended "separation". Mr. Maguire says that Mr. Salcito, who wrote the minutes explained he used it interchangeably in other minutes with "separation" (111a). Mr. Salcito explained at the Trustees' meeting of January 2, 1975 that as a layman he did not intend the significance of

"termination" which the attorney for Local 14 refers to in the affidavit of Mr. Nolan (111a).

5) Mr. Maguire reiterates his understanding of the intent of the employer trustees and himself to mean "separation" (112a).

6) Trustees Maguire and Rizzuto inform Chairman Gerosa, that the membership of Local 14 and Local 15 approved the "separation" of the Funds (121a).

7) In answer to the question of New York State Insurance Department examiner, Local 14 Trustee Rizzuto said that Martin E. Segal Co. compiled a report for the feasibility of the "separation" of the Funds (121a).

8) Employer Trustee Robke in his affidavit of January 16, 1975 in opposition to the motion to dismiss the Petition says his intention was that the Funds be divided (153a).

9) Employer Trustee Gerosa in his affidavit of January 16, 1975 speaks of the intent of Local 14 to separate and divide the Funds (158a).

10) Each of the actuaries and attorneys at the second meeting before the Special Master at his office on July 11, 1975 other than the actuary and attorney for Local 14 opposed the use by Martin Segal & Co. of Section 10, when it was disclosed to them for the first time of the full impact of Section 10 procedures in the division of the Joint Pension Fund. They stated it was inconsistent with Judge Ward's decision to separate the funds into 4 separate funds on an equitable basis (194a, 195a). Messrs. Maresca and Lacetti, did not express any opinion, other than to shrug their shoulders and reply "we are only following the directions of the Court (Section 10)" (196a).

11) Peter D. Stergios Esq. of counsel for the General Contractors Association and Employer Trustee O'Neill

submitted an affidavit in support of motion of the Board of Trustees, other than Trustee Nolan to modify the order of May 21, 1975 to eliminate Section 10. The actuarial firm of A. S. Hansen, Inc. engaged by the employer Trustee Robke (predecessor of Trustee O'Neil) reported that procedures in Section 10 would not result in an equitable division (211a, 212a, 213a, 214a).

12) Edward O. Adler, of Counsel to Employer Trustee Gerosa in his affidavit in support of the motion to strike Section 10 says that Mr. Gerosa desires the funds be separated in an equitable manner and quotes the decision of Judge Ward in reliance thereon. He says Section 10 would not be the approach to an equitable solution (216a).

13) William J. Corcoran, attorney for the Board of Trustees in a reply affidavit to Messrs. O'Hara and Maresca representing Local 14 says that the sole authority for the claim that Section 10 is an accepted formula for dividing the Joint Pension Fund is Mr. Maresca of Segal & Co. Three actuaries representing the Board of Trustees and the Individual Trustees contend that this is not an accurate statement and that Section 10 was designed only if termination were to take place and only if termination was taking place soon after the plan became effective. It is not even suited for use in case of termination as of this date. Although attorney O'Hara continues to say that the resolution of the Trustees to divide the funds refers to Section 10, this is untrue. No reference to Section 10 is made (274a). Mr. Maresca's firm of Martin Segal & Co. is the only actuarial firm assured of being retained by Local 14 when the separation is complete and that may explain his support for Section 10, despite its ostensible inequity (278a).

14) The affidavit of Sol Talor, actuary for the Board of Trustees clearly demonstrates that Section 10 pertains to liquidation or termination and will not make for an equitable division (284a, 285a).

15) Robert D. Brady attorney Local 15 disputes Mr. O'Hara's statement respecting the change in actuarial assumptions that they were arbitrarily changed. Mr. Brady points out that Mr. Kennedy, partner of Mr. O'Hara agreed to the preparation of the memorandum.

16) Mr. Richard O'Neill, Employer Trustee whose affidavit is erroneously listed "in opposition to motion" to modify order of Judge Ward (299a) actually in support of the motion says: To the best of my knowledge, at no time did the General Contractors Association of New York Inc., a party to the negotiations, assume or agree that the Joint Funds were to be decided in accordance with Section 10" (301a).

POINT III

The reversal of the order of May 25, 1976 will materially advance the termination of litigation by deterring the commencement of actions by disenfranchised participants claiming that their vested rights have been destroyed by the use of Section 10.

The Joint Pension Plan under Section 4, Subsection (5) provides that all participants who have at least 15 years of Credited Service, either Past Service or Future Service or a combination of both, and who thereafter cease to work in the industry shall be eligible for a vested Pension payable at age 62 (69a). The Pension plan, prior to any amendments required under ERISA had approximately 1,300 participants under age 62 (normal retirement age) with 15 or more years of service.

If ERISA were to be taken into account and the Plan were to provide vesting after 10 years of credited service, an additional 1,100 participants would have 10 or more

years service. Accordingly the number of participants under age 62 with 10 or more years of credited service totals approximately 2,400. This is a substantial number of participants who could be disenfranchised if Section 10 of the Plan were utilized for the separation of assets. (The above figures were prepared by Mr. Sol Talor, Vice President and Regional Manager of Tolley International Corporation, actuary for the Board of Trustees).

Section 203 of the Pension Reform Act of 1974 (Title 29 U.S.C. Section 1053) provides that an employee's right to his normal retirement benefit is non-forfeitable upon the attainment of normal retirement age and in addition shall satisfy the requirements of paragraphs (1) and (2) of this subsection. Reference is made to non-forfeitable rights on the basis of at least 5 years or at least ten years of service as the case may be, sub-paragraph (c)(i) provides for at least five years of service and with respect to whom the sum of his age and years of service equals or exceeds 45 years, such a participant has a non-forfeitable right to a percentage of his accrued benefit derived from employer contributions.

These contractual or statutory rights either under the Pension Plan or ERISA will be lost to a substantial number in the event Section 10 is applied. Such an occurrence will lead only to future law suits to enforce their rights.

Judge Moore in his stare decisis approach to the problem in his dissent in *Marco v. Dulles*, 268 F2d 192 at page 194, says the intent of the Supreme Court was to avoid repetition, duplication, delay and expense. Acceptance by the Court of the Special Master's recommendation effectively extinguishes the rights of a substantial number of participants through the use of Section 10. As was said

in *Silver Chrysler Plymouth Inc. v. The Chrysler Motors Corp.*, 496 Fed. 2d 800, "since the ultimate objective is to bring before an Appellate Court an important question, which, if unresolved, might well taint a trial, why should not this question be presented before judicial and attorney time be needlessly expended."

CONCLUSION

Wherefore it is respectfully prayed that the order of Judge Ward dated May 25, 1976 be reversed to the extent of deleting therefrom Section 10 of the Joint Pension Plan and ordering that the Special Master be directed to continue the process of determining an equitable allocation of the Joint Pension Fund.

Respectfully yours,

CORCORAN & BRADY

*Attorneys for the Trustees of the Joint
Pension Fund Other Than Trustee
Nolan, Appellants*

By: WILLIAM J. CORCORAN

~~NEW YORK Supreme Court~~

Appellate Division

Department

U S. COURT OF APPEALS FOR THE SECOND CIRCUIT

INTERN"L UNION OF OPERATING ENGINEERS

VS

JOINT PERSION FUND INTERN"L UNION OF OP ENG.

State of New York, County of New York, ss.:

HAROLD DUDASH, being duly sworn deposes and says that he is
 agent for Corcoran & Brady, the attorney
 for the above named appellants herein. That he is over
 21 years of age, is not a party to the action and resides at 2346 Holland Avenue, Bronx, N. Y.

That on the 28th day of september, 1976, he served the within brief in behalf of
 appellants

upon the attorneys for the parties and at the addresses as specified below

Doran, Colleram O'Hara Pollio & Dunne, attorneys for the appellees,
 1461 Franklin Avenue, Garden City, NY 11530

by depositing two copies
 to each of the same securely enclosed in a post-paid wrapper in the Post Office regularly main-
 tained by the United States Government at
 90 Church Street, New York, New York
 directed to the said attorneys for the parties as listed above at the addresses aforementioned,
 that being the addresses within the state designated by them for that purpose, or the places
 where they then kept offices between which places there then was and now is a regular com-
 munication by mail.

Sworn to before me, this28th..
 september, 1976
 day of 1976


 ROLAND W. JOHNSON,

Notary Public, State of New York
 No. 4509705

Qualified in Delaware County
 Commission Expires March 30, 1977